

1993

# Your Money or Your Life: A Modest Proposal for Mandatory Pro Bono Services

Mary I. Coombs

*University of Miami School of Law*, [mccoombs@law.miami.edu](mailto:mccoombs@law.miami.edu)

Follow this and additional works at: [https://repository.law.miami.edu/fac\\_articles](https://repository.law.miami.edu/fac_articles)



Part of the [Legal Ethics and Professional Responsibility Commons](#)

---

## Recommended Citation

Mary I. Coombs, *Your Money or Your Life: A Modest Proposal for Mandatory Pro Bono Services*, 3 B.U. Pub. Int. L.J. 215 (1993).

This Article is brought to you for free and open access by the Faculty and Deans at University of Miami School of Law Institutional Repository. It has been accepted for inclusion in Articles by an authorized administrator of University of Miami School of Law Institutional Repository. For more information, please contact [library@law.miami.edu](mailto:library@law.miami.edu).

# YOUR MONEY OR YOUR LIFE: A MODEST PROPOSAL FOR MANDATORY PRO BONO SERVICES

MARY COOMBS\*

In this essay, I propose a new form of mandatory pro bono legal services. This proposal incorporates two distinctive features which immunize it against many of the objections that have thwarted implementation of other mandatory programs. First, this proposal would require lawyers to provide a certain number of hours of pro bono legal services or an amount of money equivalent to what that lawyer would have earned had she spent the same number hours in her paying practice. The purpose is to allow lawyers to choose freely, in light of their own interests, schedules and alternative uses of their time, whether to donate time or money. Second, the program restricts its eligible client base to the poor or to organizations serving predominantly poor clients. In doing so, it excludes other clients and causes which traditionally benefit from pro bono legal services. To offset this restriction, this proposal mandates that lawyers provide only 20 hours of service per year or its monetary equivalent.

I put forth this proposal cognizant of the lively debate in the literature over the legitimacy and the appropriate form of mandatory pro bono<sup>1</sup> and of the fact that the debate so far has been wholly academic.<sup>2</sup> This proposal is designed to facilitate the enactment of a mandatory pro bono system by responding to some of the criticisms and concerns. First, I briefly set out the objectives of a mandatory pro bono system and the most common objections. Then, I show how the proposed system is constructed to achieve the objectives and to meet or defuse the objections. Finally, I describe the proposal in some detail, focusing particularly on the question of administrability, which is its

---

\* Professor of Law, University of Miami. With thanks to Lisa Bernstein, who inspired the project, and to my many colleagues at Miami who exemplify the commitment to legal advocacy for the disadvantaged.

<sup>1</sup> See, e.g., Steven B. Rosenfeld, *Mandatory Pro Bono: Historical and Constitutional Perspectives*, 2 CARDOZO L. REV. 255 (1981); David L. Shapiro, *The Enigma of the Lawyer's Duty to Serve*, 55 N.Y.U. L. REV. 735 (1980); *Symposium on Mandatory Pro Bono*, 19 HOFSTRA L. REV. 739 (1991); Beth M. Coleman, Note, *The Constitutionality of Compulsory Attorney Service: The Void Left by Mallard*, 68 N.C. L. REV. 575 (1990). See generally ABA/BNA LAWYERS' MANUAL ON PROFESSIONAL CONDUCT 91: 6002-05 (1990) (discussing arguments for and against mandatory pro bono) and sources cited therein.

<sup>2</sup> No jurisdiction has instituted a true mandatory pro bono program. The closest is a "mandatory program" of the Orange County Bar in Florida, but the only sanction is denial of membership in a voluntary local bar association. See Cynthia R. Watkins, Note, *In Support of a Mandatory Pro Bono Rule for New York State*, 57 BROOK. L. REV. 177, 187 n.55 (1991).

greatest apparent weakness.

## I. A SUMMARY OF THE OBJECTIVES AND OBJECTIONS TO MANDATORY PRO BONO

### A. *Objectives*

A primary objective of any mandatory pro bono program is to increase the quantity of legal services available to the poor. These include both direct, individual legal services for low-income individuals and impact litigation serving the needs of the poor or groups overwhelmingly comprised of low-income persons, such as children in foster care, battered women, or prisoners.<sup>3</sup> Proponents of mandatory pro bono have shown that providing such services is desirable and that it is unlikely that services adequate to meet the need will be provided in the absence of some form of mandatory pro bono.

There is also an implicit rationale for pro bono, mandatory or voluntary, in notions of professional obligation. Advocates of pro bono assert that various aspects of the practice of law, including its character as a learned profession and its monopoly on access to the justice system, make it morally and constitutionally appropriate to impose at least part of the cost of meeting the need for pro bono services on the legal profession. Some also argue that the benefit to lawyers of performing pro bono services is an independent objective.<sup>4</sup>

A well-designed mandatory pro bono program will also minimize interference with other valued activities lawyers engage in. This objective, like the others, is both a substantive goal and a political one: opponents of mandatory pro bono have succeeded, in part, because they have persuaded the bar that the cost of such programs outweighs the benefits to the poor.

### B. *Objections*

Some objections apply to any pro bono plan. This proposal is neither better nor worse in meeting them. I note these objections briefly to rebut the concern that any are dispositive, and would thus render this essay an exercise in futility. Below, in section II, I seek to show how the monetary buy-out proposal, which entails a limited obligation, is more responsive than alternative proposals to these objections.

The objections to mandatory pro bono fall into several categories. First, some contend that there is not a substantial need for more pro bono legal services for the poor. Second, there are the constitutional/policy objections that it is wrong to require lawyers to do legal work they do not choose to do:

---

<sup>3</sup> This essay does not take any position on what *forms* of advocacy, e.g., legislative lobbying, attorneys may engage in on behalf of eligible clients. Such a discussion is peripheral to this program's key innovations of restricting the client base to the poor and of time-or-money.

<sup>4</sup> I reject this claim. Mandatory obligations on adults cannot be justified by their moral benefit to the obligee. See *infra* text accompanying note 14.

opponents have asserted that it violates the First, Thirteenth and Fourteenth Amendments.

Third, there are equality arguments. Some complain that the obligation falls disproportionately on certain lawyers, such as busy solo practitioners. Others object because certain categories of lawyers, such as corporate lawyers or government lawyers, are excluded. Although including them is very impractical, excluding them may seem unfair to the lawyers who are burdened.

Fourth, opponents contend that mandatory pro bono may harm potential clients because most lawyers are untrained in the areas of law relevant to poor peoples' needs. Mandatory pro bono work, then, may result in a higher incidence of malpractice. Alternatively, it is claimed that it is inefficient to require every lawyer to become proficient in such arcane areas as public benefits or eviction law in order to do a modest amount of legal work for the poor.

Finally, there are arguments that mandatory pro bono is inconsistent with the values underlying voluntary pro bono: it erodes the sense of volunteerism and the psychic value to the lawyer while reducing the legal services available for other good causes not included within the scope of the mandatory pro bono program.

## II. A BETTER WAY: HOW THIS PROPOSAL MEETS THE OBJECTIONS

The objections mentioned above seem largely unpersuasive. Every study has shown that the poor have significant unmet legal needs.<sup>5</sup> The truth of this claim is not weakened even if potential clients would not include access to lawyers on their list of high-priority needs. Legal services are an instrumental rather than a final good. The poor, like all of us, want adequate housing and medical care, custody of their children and protection from violence. Legal services in evictions, Medicaid cutoffs, marital disputes and domestic violence restraining orders are means to these ends.<sup>6</sup> Furthermore, given the extent of

---

<sup>5</sup> See, e.g., ABA STANDING COMM. ON LAWYERS' PUBLIC SERVICE RESPONSIBILITY, REPORT TO THE HOUSE OF DELEGATES 6-7 (Feb. 1993) [hereinafter SCLPSR REPORT] ("[O]nly about 14 - 20% of the legal needs of the poor are being addressed," according to one national study; this finding is supported by other studies in Illinois, Maine, Maryland, Massachusetts, New York, Ohio, and Virginia.) (on file with the *Boston University Public Interest Law Journal*); Esther Lardent, *Mandatory Pro Bono in Civil Cases: The Wrong Answer to the Right Question*, 49 MD. L. REV. 78, 86 (1990) (suggesting that the extent of the need has increased in the last decade with the increased number of Americans living in poverty and the increased complexity of their daily lives while government funding of legal services has remained steady, or even declined); Sandra Day O'Connor, *Meeting the Demand for Pro Bono Services*, 2 B.U. PUB. INT. L.J. 1 (1992).

<sup>6</sup> See, e.g., O'Connor, *supra* note 5, at 1-2 (describing devastating effect of lack of pro bono legal services on the legal rights of poor subjected to evictions and AFDC benefit cut-offs). In light of imperfections in the information market and patterns of risk perceptions, it is not unreasonably paternalistic to offer the poor legal services at a level perhaps higher than they might choose *ex ante* relative to other goods. See Sha-

the unmet need, we need not worry that requiring the legal profession to provide 20 hours per lawyer per year of legal services to the poor will lead to frivolous litigation. There is simply too much non-frivolous work to be done.<sup>7</sup>

Similarly, the simultaneous general public obligation to provide legal services to the poor does not vitiate the particular pragmatic or moral justifications for requiring lawyers to do so. One could argue that the need for legal services, like the need for food or housing or medical care for the poor, is a general social obligation to be met by taxes.<sup>8</sup> Certainly, such general societal subsidization of the legal needs of the poor is appropriate. It seems extremely unlikely, however, that the government will fully fund legal services.<sup>9</sup> If

---

piro, *supra* note 1, at 780. I thus reject Professor Macey's contention that the small amounts spent by the poor and middle class on legal services is definitive evidence of a rational choice to allocate their resources to other goods. Jonathan R. Macey, *Mandatory Pro Bono: Comfort for the Poor or Welfare for the Rich?*, 77 CORNELL L. REV. 1115, 1116 (1992).

<sup>7</sup> Ordinarily, we rely on the market to allocate goods and services, including legal services, to the greatest needs. No such market operates to allocate mandatory pro bono services. Nonetheless, so long as demand exceeds supply, there is likely to be a structuring that will focus the legal services on the most pressing needs. Thus, for example, uncontested divorces with no children and little property would likely continue to be handled *pro se*, with perhaps some lawyer-provided training, as occurs in such divorces between non-poor couples. It is also worth noting that some needs are not readily translated into dollar value and may reflect an intensely felt need, even on the part of those too poor to create effective demand, such as cases involving child custody or appropriate educational placements. *But see* Macey, *supra* note 6, at 1118 (suggesting that forced pro bono will "lawyer up" disputes that ought to be handled without the intervention of attorneys). Furthermore, many of the legal needs of the poor may be met by the provision of non-litigative legal work. *Cf.* Rosenfeld, *supra* note 1, at 267 n.52 (rejecting argument that mandatory pro bono "would breed a wave of new litigation in areas where non-litigated solutions should be sought").

<sup>8</sup> Advocacy of mandatory pro bono is consistent with advocacy of other devices to increase the availability of legal services to the poor. Interest on Lawyer Trust Account funds is a valuable resource and could be directed entirely towards the poor, but it involves amounts wholly incommensurate with needs. Deregulation of routine legal services is one valuable but partial solution to the problem of unmet legal needs of the poor. *See* DAVID LUBAN, *LAWYERS AND JUSTICE: AN ETHICAL STUDY* 269-72 (1988). Legal reforms might also increase fee-shifting, so that defendants would bear more of the costs of such services. *See, e.g.,* F. RAYMOND MARKS ET AL., *THE LAWYER, THE PUBLIC AND PROFESSIONAL RESPONSIBILITY* 275 (1972). However, some cases, such as custody, may involve low-income litigants on both sides. Furthermore, expansion of such fee-shifting rules as the Equal Access to Justice Act are probably as politically unfeasible as adequate public funding for legal services.

<sup>9</sup> The authors of the Marrero Committee Report noted that they would not advocate mandatory pro bono if they were convinced "that higher public appropriations commensurate with the demand were a realistic prospect in the immediate future." COMMITTEE TO IMPROVE THE AVAILABILITY OF LEGAL SERVICES, *Final Report to the Chief Judge of the State of New York*, reprinted in 19 HOFSTRA L. REV. 755, 779-80 (1991)

mandatory pro bono is otherwise justifiable and can help meet the demand, it ought not be rejected out of a baseless fear that it will deter the government from a commitment it would otherwise make.

Some mandatory pro bono proposals meet the remaining objections and fulfill the objectives of mandatory pro bono better than others. In order to highlight the advantages of the proposal presented here — a relatively light obligation fulfilled by provision of time or money, I contrast it with a mandatory version of the aspirational goal recently adopted by the American Bar Association (ABA) — 50 hours per year, encouraging, in particular legal services to the poor, (though without any specified hours obligation) without a monetary opt-out.<sup>10</sup>

#### A. *Advantages of a Monetary Buy-out*

The central feature of this proposal is a monetary opt-out provision designed to make the lawyer's choice between time and money as unconstrained as possible. Its primary benefits are the freedom it provides to lawyers (compared to other mandatory pro bono plans) and the value it provides to beneficiaries.

The time and money options are designed to be truly equivalent,<sup>11</sup> and thus

---

[hereinafter *Marrero Report*]. The current political climate is a hostile one for any increased general tax.

I recognize that mandatory pro bono is similarly unlikely to be put into effect in the near future, given the widespread opposition within the bar. See, e.g., Lardent, *supra* note 5; Stephen T. Maher, *No Bono: The Efforts of the Supreme Court of Florida to Promote the Full Availability of Legal Services*, 41 U. MIAMI L. REV. 973, 986 n.77 (1987); Scott Slonim, *Kutak Panel Report: No Mandatory Pro Bono*, 67 A.B.A. J. 33, 33 (1981); Suzanne Bretz, Note, *Why Mandatory Pro Bono Is a Bad Idea*, 3 GEO. J. LEGAL ETHICS 623, 632-35 (1990) (describing the intensely negative reaction of the North Dakota bar to a mandatory pro bono proposal). Nonetheless, it is useful to construct the most practical and politically feasible program. Furthermore, the general anti-lawyer sentiments prevalent today may have the unplanned effect of inducing a more serious consideration by the bar of mandatory pro bono as an "image enhancer."

<sup>10</sup> See MODEL RULES OF PROFESSIONAL CONDUCT Rule 6.1 (1993) (emphasis added):

A lawyer should aspire to render at least (50) hours of pro bono publico legal services per year. In fulfilling this responsibility, the lawyer should: (a) provide a *substantial majority* of the (50) hours of legal services without fee or expectation of fee to: (1) persons of limited means or (2) charitable, religious, civic, community, governmental and educational organizations in matters which are designed primarily to address the needs of persons of limited means.

<sup>11</sup> The proposal is designed to maintain this financial neutrality as applied to after-tax income. Time contributions would be neither deductible nor a source of taxable income. One choosing the monetary option would presumably earn the corresponding income and then contribute it to a legal services organization. Since it is mandatory, this would count as a fully deductible business expense. The only problem might arise in the case of lawyer-employees who chose the mandatory option, were uncompensated by their employer and were subject to the limitation of the deductibility of

to permit lawyers to make their own assessments whether to contribute time or money, based on their workloads,<sup>12</sup> skills, and interests (including their desire to allocate their own legal work only to paying clients or to causes not within the mandatory program). Some lawyers may welcome the break from routine, the chance to have direct client contact, or the opportunity to litigate that pro bono work for the poor is likely to provide. Others may not wish to disrupt their practices or find the need to learn a new area of substantive and procedural law highly burdensome. The choice is theirs.

Simultaneously, the poor will benefit more under a plan with a buy-out option than under a straight time obligation, because they will receive either work performed by those who choose to do such work or an equal or larger quantity of services from public interest lawyers funded through monetary contributions. The funds generated by attorneys exercising the monetary option can support other lawyers - providing more legal services - in moderately paid full-time legal services work. Assume, for example, that it costs \$50,000 a year to support a beginning legal services lawyer (\$25,000 salary and \$25,000 to cover overhead expenses) who can provide 2,000 hours in legal work for the poor. The monetary contributions of 12.5 lawyers earning \$200 per hour would support that lawyer, though they would have directly provided only 250 hours of such services.

Indeed, given that poverty lawyers are surely paid less on average than other lawyers, the total contribution toward meeting the legal needs of the poor would be even greater if the proposal were solely monetary, i.e., a graduated tax on lawyers' incomes.<sup>13</sup> It is important, however, to maintain the option of contributing services. First, it acknowledges the link between the obligation and its justification in traditions of lawyer professionalism. Second, the service option facilitates, while not compelling, those benefits which may arise when lawyers whose usual client base is wealthy and corporate engage directly with the poor and their legal problems.<sup>14</sup> This can be a valuable fringe

---

unreimbursed employee expenses. See 26 I.R.C. §§ 62(a), 63(d), 67(a)-(b) (1992). While the organizations to which the contributions would be made would presumably be eligible to receive tax-deductible charitable contributions under Internal Revenue Code section 501(c)(3), the fact that the contribution meets a professional obligation might make the Internal Revenue Service view it as non-charitable.

<sup>12</sup> If an attorney has periods in which she has a light load of remunerated work, she could apply those hours to pro bono. Since attorney time is a non-storable resource, this would be rational behavior. In turn, this would contribute to the progressive aspect of the overall program since the costs would be less to those attorneys who were underemployed.

<sup>13</sup> See Carolyn Elefant, *Just Give Money*, AM. LAW., Jan.-Feb. 1993, at 109.

<sup>14</sup> As the Marrero Committee suggested, there is "inherent value to individual attorneys and to the profession in having some pro bono legal services provided individually." *Marrero Report*, *supra* note 9, at 805. This concern is fully met by a proposal that allows individual attorneys to make the "time or money" choice, while minimizing the moral or economic pressure between them. It may be that actually doing pro bono work "is good for the professional soul of the draftee." Shapiro, *supra* note 1, at 782;

benefit of pro bono legal service, particularly when, as in this proposal, the lawyer has chosen to provide such services.

Increasing lawyer employment is not the goal of mandatory pro bono. Nonetheless, it is clear that there is currently significant interest among law students and young lawyers in public interest work, while government and foundation financial subsidization of such jobs is on the decline. A fringe benefit of this proposal is that it would provide a source of funding through a kind of professional cross-subsidization for young lawyers who wish to do full-time legal work on behalf of the poor.

The desirability of a "time-or-money" form of pro bono is particularly evident when examining the constitutional objections raised against mandatory pro bono.<sup>16</sup> Opponents have suggested three constitutional problems, that it:

---

*see also* LUBAN, *supra* note 8, at 282 (suggesting that mandatory pro bono "realizes positive human goods, for lawyers as well as their poverty-vexed clients"). Even if the bar or the legislature had a legitimate interest in saving lawyers' souls, it would be outweighed by the concern for poor people's legal needs and the risk to the client of such reluctant lawyers.

The primary justification for mandatory pro bono is to increase legal services for the poor. It is not to make lawyers better people. Such paternalism seems to lie behind the rule proposed by the Marrero Committee that would exclude attorneys admitted to practice for less than two years from the pooling option on the theory that such pro bono lawyering "is a formative experience . . . [and] useful to harness the energies and idealism of lawyers." *Marrero Report*, *supra* note 9, at 799. *See also* Barlow F. Christensen, *The Lawyer's Pro Bono Publico Responsibility*, 1981 AM. B. FOUND. RES. J. 1, 18 ("[A]doption of a mandatory pro bono program, . . . [b]y causing all lawyers to be involved, on an individual basis, in directly serving 'the cause of the defenseless or oppressed,' . . . might help the individual lawyer . . . retain some sense of the traditional service-before-gain ethic.") (quoting HENRY S. DRINKER, *LEGAL ETHICS* 326 (1953)).

Pro bono should not be seen as a form of remediation for the cynicism and commercialization of legal practice. The effect on the lawyer must always be secondary to the value to the client.

<sup>16</sup> Because there is no existing mandatory pro bono program, the constitutional debate has generally drawn on cases in which a particular lawyer has been assigned by a court to represent a particular client without compensation. That law is unclear. *See, e.g.,* *United States v. Dillon*, 346 F.2d 633 (9th Cir. 1965) (constitutional), *cert. denied*, 382 U.S. 978 (1966); *In re 9 Applications*, 475 F. Supp. 87 (N.D. Ala. 1979) (unconstitutional); *In re Smiley*, 330 N.E.2d 53 (N.Y. 1975) (constitutional). *See also* *Mallard v. United States Dist. Court for Southern Dist. of Iowa*, 490 U.S. 296, 300-08 (1989) (finding that 28 U.S.C. § 1915(d) did not authorize compulsory appointments to represent indigents in civil cases). *See generally*, Rosenfeld, *supra* note 1 (recognizing an attorney's duty to accept uncompensated appointment); Greg Stevens, Note, *Forcing Attorneys to Represent Indigent Civil Litigants: The Problems and Some Proposals*, 18 U. MICH. J.L. REF. 767 (1985) (arguing against uncompensated court appointments).

Even a traditional mandatory pro bono proposal, however, avoids much of the constitutional weaknesses of such an order. No attorney is forced to represent a particular



amounts to involuntary servitude prohibited by the Thirteenth Amendment, is a taking without compensation under the Fourteenth Amendment, and is a forced expression of belief (in the value of pro bono causes) contrary to an individual's conscience forbidden by the First Amendment. Whatever validity these arguments might have in the context of a different program, they are inapplicable to a time-or-money option.

A mandatory version of Model Rule 6.1 would oblige every lawyer covered by it to spend more than a week per year doing uncompensated legal work for eligible causes and individuals. While such an obligation is mild in contrast to the slavery or peonage that lies at the heart of the Thirteenth Amendment, it is at least within the same conceptual frame.<sup>16</sup> The proposal here, by contrast, is economically and normatively indifferent to the choice of money or services. Since the obligee is wholly free to provide money, the Thirteenth Amendment argument collapses of its own weight.<sup>17</sup> The notion that mandatory pro bono is a taking is equally untenable. In effect, it is a tax on a profession, a variant on traditional income taxes and franchise fees, with a service alternative to the monetary obligation. Such taxes are a common feature of our legal landscape and are not generally seen as takings.<sup>18</sup> At most, one needs to show that there

---

client. Cf. Shapiro, *supra* note 1 (suggesting ethical problems). The extent of the obligation is limited, and the universality of the obligation avoids the inequity of a disproportionate burden on a few lawyers. If, as under this proposal, the obligation can be met by a monetary contribution, the persuasiveness of arguments based on these forced representation cases is still weaker.

See also *In re Amendments to Rules Regulating the Florida Bar 1-3.1(a) and 8 Rules of Judicial Administration - 2.065 (Legal Aid)*, 598 So.2d 41 (Fl. 1992) [hereinafter *Florida Bar Rules II*] (rejecting constitutional objections to mandatory pro bono in dicta).

<sup>16</sup> Courts have generally limited Thirteenth Amendment claims to "those forms of compulsory labor akin to African slavery." *United States v. Kozminski*, 487 U.S. 931, 942 (1988) (upholding conviction for peonage) (quoting *Butler v. Perry*, 240 U.S. 328, 332 (1916)). See also *Steirer v. Bethlehem Area Sch. Dist.*, 987 F.2d 989, 1000 (3d Cir. 1993) (rejecting Thirteenth Amendment challenge to program requiring 60 hours of community service as condition of high school graduation), *cert. denied*, 114 S. Ct. 85 (1993).

Alternatively, some courts have held the Thirteenth Amendment inapplicable if the failure to do the demanded work results only in economic loss. *Flood v. Kuhn*, 407 U.S. 258 (1972). The Florida Supreme Court applied this approach in holding that mandatory pro bono would not violate the Thirteenth Amendment. *In re Amendments to Rules Regulating the Florida Bar 1-3.1(a) and 8 Rules of Judicial Admin. - 2.065 (Legal Aid)*, 573 So.2d 800 (Fl. 1990) [hereinafter *Florida Bar Rules I*].

<sup>17</sup> The free substitution of money for time in meeting the commitment also significantly reduces the force of the moral arguments against mandatory pro bono as an interference with liberty. See Roger C. Cramton, *Mandatory Pro Bono*, 19 HOFSTRA L. REV. 1113, 1132-33 (1991).

<sup>18</sup> Takings claims have been raised against mandatory interest on lawyers' trust accounts (IOLTA) programs, which require lawyers to transfer the interest on accounts too small or transient to justify opening separate accounts into a special foun-

is a rational relationship between the identity of the group taxed and the purposes of the tax. The arguments advanced by others in favor of mandatory pro bono - the traditional obligations of the profession, the general public subsidization of the justice system from which lawyers as a class benefit, the quid pro quo for the license - are surely sufficient to meet the constitutional rational basis test.<sup>19</sup>

Finally, mandatory pro bono, especially in the form proposed here, does not require the lawyer to profess or support any particular belief, and thus raises no First Amendment problem. The obligation can be met by providing any form of legal work to indigent persons or monetary support to any organization doing such work. It is difficult to imagine anyone claiming that she has a belief system which is offended by providing any legal assistance to any group of poor people.<sup>20</sup> Furthermore, whatever validity the First Amendment claims

---

dation account used to support various public interest law programs. These challenges have been rejected. *See e.g.*, *Cone v. Florida Bar*, 626 F. Supp. 132 (M.D. Fla. 1985), *aff'd*, 819 F.2d 1002 (11th Cir. 1987), *cert. denied*, 484 U.S. 917 (1987). Concededly, the takings claim is particularly weak since, in the absence of such programs, the attorney is ethically free to place the money in a non-interest-bearing account so that the plaintiff-clients would obtain no benefit from their victory.

<sup>19</sup> Shapiro, *supra* note 1, at 772-74, suggests that mandatory pro bono could be viewed as an "eminent domain of person" since it interferes with "investment-backed expectations" in human capital. But whether something amounts to a taking depends on whether such a rule was foreseeable at the time of the investment. *See, e.g., Florida Bar Rules I*, 573 So.2d at 805 (holding that lawyers have already accepted the obligation of pro bono work as "a condition of their license to practice law" and that it is thus not a taking).

Shapiro concedes that the historical basis for a lawyer's duty to serve is "shrouded in obscurity, ambiguity, and qualification." Shapiro, *supra* note 1, at 738. Even this uncertain history is sufficient to undermine the argument that a clear prior right has been "taken." *See generally* Jeremy Paul, *The Hidden Structure of Takings Law*, 64 S. CAL. L. REV. 1395 (1991) (noting the inherent circularity of most takings claims).

<sup>20</sup> I thus find more imaginative than serious Professor Shapiro's concern that an obligation to provide some legal service to poor clients may "end up being antagonistic to the values of some who are required to serve." Shapiro, *supra* note 1, at 765. First, that a lawyer believes legal services to the poor are unproductive does not appear to be akin to the political beliefs that are protected from forced support in *Abood v. Detroit Board of Education*, 431 U.S. 209 (1977), and *Keller v. State Bar of California*, 496 U.S. 1 (1990). It is more like a belief that bar examinations are unproductive in assuring competent lawyers or a dislike of activities related to "improving the quality of legal services." *Keller* indicates that such activities may be the basis for compulsory dues. *Keller*, 496 U.S. at 9-17.

Second, the act of doing pro bono work, or contributing to a legal services program, is not expressive conduct. An observer is unlikely to interpret such behavior as an endorsement of the value of such activities, especially if the work is obligatory. *Cf. Steirer v. Bethlehem Area Sch. Dist.*, 987 F.2d 989, 996-97 (3d Cir. 1993) (rejecting First Amendment challenge to program requiring 60 hours of community service as a condition of high school graduation on parallel reasoning), *cert. denied*, 114 S. Ct. 85

may have, they crucially depend on the obligation being imposed by a quasi-private group such as a bar association. If it were constitutionally necessary, the obligation could be mandated by statute. At least with the monetary option, this would be determinative, for it is clear that one has no First Amendment right to complain about the causes towards which one's taxes are directed. One could scarcely have a stronger claim when the challenged law provides some choice among those causes.

This proposal also provides the best response to the pragmatic objection that some lawyers may lack the competence to do poverty law and that forcing them to do so will induce malpractice. These arguments are weak even when applied to traditional mandatory pro bono proposals. The obligation can be met by a wide variety of legal work; it seems unlikely that many attorneys lack any skills and knowledge that can be applied to the legal problems of the poor.<sup>21</sup> Corporate and tax specialists, for example, can help structure non-profit organizations designed to provide food, housing or other services to the poor. Whatever plausibility such an argument might otherwise have, however, wholly evaporates when, as here, an attorney who is unable or unwilling to develop the competence to carry out some form of legal work for the poor can simply choose the monetary option.

Similarly, more general concerns that the interests and skills of the available pool of lawyers will not match the needs of poor clients seem overstated. If there is a large unmet need, then it is unlikely that willing lawyers will lack potential clients; if some legal needs of poor people are better met as a result of mandatory pro bono, it is of limited relevance that other needs are still underserved.<sup>22</sup> Again, the validity of the objection is sharply reduced insofar as lawyers can and do contribute money, which can be directed toward funding public interest lawyers to provide the forms of legal service most desired by potential pro bono clients.

The monetary option also allows the imposition of the obligation on various categories of lawyers who may find it difficult or impossible to provide direct legal services, such as in-house corporate counsel, government attorneys, legal aid lawyers and law professors.<sup>23</sup> The program would work even if all attor-

---

(1993).

<sup>21</sup> See, e.g., Sol Wachtler, *Introduction*, 19 HOFSTRA L. REV. 739, 741 (1991) (noting that "specialists are not the only ones who are competent to provide the services").

<sup>22</sup> It is not a violation of client autonomy to provide a lawyer willing and able to handle her tax problem, but not one able to handle the child support enforcement that she might find more pressing if the limitations of the services offered are made clear beforehand. The market, too, may drive people to take what they can afford in lieu of what they want more but cannot afford.

<sup>23</sup> See, e.g., FLORIDA BAR/FLORIDA BAR FOUNDATION JOINT COMMISSION, PROPOSED RULE 4-6.2 cmt. [hereinafter FLORIDA BAR JT. RPT.] (on file with the *Boston University Public Interest Law Journal*); SCLPSR REPORT, *supra* note 5, at 9; Lisa G. Lerman, *Public Service By Public Servants*, 19 HOFSTRA L. REV. 1141 (1991) (problems for government attorneys).

neys in these categories were to give only money. The advantage of providing true choice would be limited, however, to attorneys in traditional practice. Thus, it would be desirable simultaneously to encourage government and corporate employers to eliminate ethical and practical barriers to such free choice by their attorney-employees. For example, they could eliminate unnecessarily broad rules regarding potential conflicts of interest. They could provide flexibility at the margins by permitting attorneys to use office telephones, computers, and office space while carrying out tasks associated with pro bono work.<sup>24</sup>

This proposal could also permit the extension of the pro bono obligation to legal services attorneys;<sup>25</sup> the employing organization would be free to recognize the money contributed by a general increase in compensation levels and/or to structure their employees' workload specifically to include work designated to meet the pro bono obligation.<sup>26</sup>

Measured against all these criteria, a time-or-money option is superior to a time-only mandated obligation. Currently, the most popular reform proposals appear to respond to the problems of mandatory time by eliminating the mandate. These proposals maintain the voluntary nature of pro bono, but specify the annual contribution that is the aspirational goal.<sup>27</sup> Given the failure of previous voluntary pro bono efforts to induce even a majority of lawyers to participate, specification without sanction seems more a public relations feint than a genuine solution.<sup>28</sup>

Given the severe limitations of both mandatory time-only and non-

---

<sup>24</sup> Lerman, *supra* note 23, at 1164-68 (conflict of interest). *Id.* at 1192-1206 (limits on use of time and resources for pro bono work).

<sup>25</sup> Legal services attorneys might meet the obligation by training other attorneys in, e.g., AFDC administrative practice.

<sup>26</sup> Similarly, other attorney-employing organizations, whether law firms or corporations, may maintain salary levels and, in effect, subsidize their employees' contribution to pro bono or may require attorney-employees to meet the obligation out of their own free time. The cost, then, will depend on the relative bargaining strengths of employers and attorney-employees.

<sup>27</sup> See, e.g., MODEL RULES OF PROFESSIONAL CONDUCT Rule 6.1 cmt. (1993) (proposing 50 hour per year aspirational obligation subject to states' decision to "choose a higher or lower number of hours . . . depending upon local needs and local conditions"); *Florida Bar Rules II*, 598 So.2d at 44 (adopting 20 hour per year aspirational goal).

<sup>28</sup> The insufficiency of voluntary programs is perhaps most dramatically illustrated by the fate of IOLTA programs, which provide funds for public interest work by allowing the pooling of small or transient trust moneys in a single interest-bearing account and the transfer of the interest to the IOLTA organization.

Where such programs are voluntary, only 14% to 36% of eligible attorneys participate, although their only ethical alternative is to place the funds in a non-interest-bearing account. Gregory A. Hearing, Comment, *Funding Legal Services for the Poor: Florida's IOTA Program — Now is the Time to Make It Mandatory*, 16 FLA. ST. U. L. REV. 337, 356 (1988).

mandatory programs, it is curious that the money option has been so little explored. Most mandatory pro bono proposals have required that lawyers contribute services. Contribution in the form of money has been forbidden or highly restricted; at best it seems to be a less favored alternative for those unwilling or unable to do what is desired.<sup>29</sup>

This chariness towards the monetary option has two likely sources: a belief that all lawyers should engage in pro bono work, as a professional obligation or because it is socially and psychologically good for them to do so; and a concern with the distorting effects of a flat-rate buy-out. I reject the former as an inappropriate paternalism: we ought not require adults to do something because we think it is good for them.<sup>30</sup> In any event, the benefits of doing good works are likely to be minimal if the work is resented as an obligation.

More serious is the concern with the distorting effects on lawyers' decisions if, as is typical, the monetary option is set at a flat rate.<sup>31</sup> Lawyers' choices would be structured by the option rather than maximally free. Furthermore, because the flat rates are generally set at a level that would be more economically attractive to most lawyers than contributing time, the proposals have severely restricted the buy-out option.<sup>32</sup>

The restriction of earlier proposals to less effective means of ensuring pro bono services may reflect historical patterns in the debate. Here, I provide a brief survey of the ABA's avoidance of a monetary option. In section III below, I respond to the concern with administrative practicality that is the likely force behind that reluctance. I will show, I hope, that a graduated,

---

<sup>29</sup> See, e.g., MODEL RULES OF PROFESSIONAL CONDUCT Rule 6.1 cmt. (1993) (stating that "the provision of pro bono services is . . . the individual ethical commitment of each lawyer. Nevertheless, there may be times when it is not feasible for a lawyer to engage in pro bono services. At such times a lawyer may discharge the pro bono responsibility by providing financial support to organizations" doing such pro bono work").

<sup>30</sup> See *supra* note 14.

<sup>31</sup> See, e.g., FLORIDA BAR JT. RPT., *supra* note 23; *Marrero Report*, *supra* note 9, at 769-70 (\$50/hour). There have been occasional suggestions by others of a "proposal framed in terms of a percentage of income or a percentage of legal fees." Cramton, *supra* note 17, at 1133. See also LUBAN, *supra* note 8, at 279; Shapiro, *supra* note 1, at 782 n.236. This essay elaborates upon those suggestions.

<sup>32</sup> See, e.g., *Marrero Report*, *supra* note 9, at 770 (buy-out only available to those practicing in firms of fewer than ten lawyers). Perhaps the most incongruous buy-out is in the newly adopted Florida plan (a concretized voluntary pro bono rule). Lawyers "should" contribute 20 hours per year or \$350. *Florida Bar Rules II*, 598 So.2d. 41. Liberal opponents of the plan pointed out that it valued pro bono time at \$17.50 per hour, but the proponents claimed that a higher dollar figure was impractical, given the voluntary nature of the whole program. See FLORIDA BAR & FLORIDA BAR FOUNDATION, *Opening the Doors to Justice - The Quest to Provide Access for the Poor in Florida* (1991) [hereinafter *Opening the Doors*] (on file with the *Boston University Public Interest Law Journal*). *Id.* at 77 (criticizing dollar figure). *Id.* at 46 (defending it).

income-specific rate is practical.

The ABA Model Rules and their background are a case study in the rejection of a genuine monetary option. The version adopted in 1983 had called on lawyers to do pro bono work, but also to provide "financial support" for organizations doing legal work for the poor.<sup>33</sup> That Rule, however, was wholly aspirational and non-specific in regard to the extent of the expected contribution.<sup>34</sup>

In 1992, a new Rule 6.1 was proposed that would have incorporated a 50-hour per year aspirational obligation,<sup>35</sup> while eliminating the provision regarding monetary contributions.<sup>36</sup> Rather, as the commentary made clear, financial support "should be in *addition* to the lawyer's provision of pro bono legal services because such service is the individual ethical obligation of each lawyer."<sup>37</sup> The text of the rule, as adopted, allows for financial contributions, but not as a substitute for the service contribution.<sup>38</sup> The commentary, however, permits a buy-out option in that narrow class of cases in which "it is not feasible for a lawyer to engage in pro bono services."<sup>39</sup>

The restricted availability of the monetary option appears to be an artifact of the unnecessary decision to set the buy-out at a flat rate. Presumably, this decision is based on the theory that an individualized buy-out would be too administratively complex. The two decisions are inextricably linked, for a freely available, flat-rate monetary option is inherently inequitable. Consider a lawyer who can earn \$200 per hour for as many hours each year as she wishes

---

<sup>33</sup> MODEL RULES OF PROFESSIONAL CONDUCT Rule 6.1 (1983).

<sup>34</sup> Earlier drafts of the 1983 version had proposed a variant of "professional tithing" in the form of an obligation to give time or money. *Text of Initial Draft of Ethics Code Rewrite Committee*, LEGAL TIMES OF WASH., Aug. 27, 1979, at 26, 45 (quoted in *Opening the Doors*, *supra* note 31, at 66) (concurring and dissenting statement of Commissioner Maher) ("A lawyer may discharge this responsibility by rendering professional service at no fee or substantially reduced fee . . . or by making financial contribution. . . . A lawyer shall give forty hours per year to such service, or the equivalent thereof."). This aspect disappeared in the adopted Rule.

<sup>35</sup> The concept of a specific, though still aspirational, approach had been adopted by the ABA House of Delegates in 1988, in the so-called Toronto Resolution.

<sup>36</sup> MODEL RULES OF PROFESSIONAL CONDUCT Rule 6.1 (Discussion Draft 1992). See SCLPSR REPORT, *supra* note 5.

<sup>37</sup> MODEL RULES OF PROFESSIONAL CONDUCT Rule 6.1 cmt. (Discussion Draft 1992) [hereinafter MRPC Rule 6.1 cmt.] (emphasis added). See SCLPSR REPORT, *supra* note 5, at 8.

<sup>38</sup> MODEL RULES OF PROFESSIONAL CONDUCT Rule 6.1 cmt. (1993).

<sup>39</sup> *Id.* at 2. According to the accompanying SCLPSR Report, this buy-out is made available for situations such as "when a lawyer is serving as a judge, is prohibited by statute or regulation from engaging in the outside practice of law, or is physically or mentally infirm." See SCLPSR REPORT, *supra* note 5, at 9. Note that the financial obligation in this narrow class of cases "should be reasonably equivalent to the value of the hours of service that would have otherwise been provided." MRPC Rule 6.1 cmt., *supra* note 37, at 2.

to work. If she were presented with the choices of giving 20 hours of her time or \$2,000 (20 hours at \$50/hour), she would rationally choose the buy-out, unless she derived \$150 per hour of psychic income from doing the pro bono work. By contrast, a lawyer who earned \$50 per hour would be indifferent between the two options, while a lawyer earning only \$35 per hour would be channeled into contributing time, since it would take him approximately 57 hours of lawyering to earn the \$2,000. In effect, the system would become one in which relatively low-paid lawyers contributed their time, while higher-paid lawyers rationally chose to buy their way out at a cost to them significantly below the actual value of the hours saved.<sup>40</sup> The proponents of such programs have responded by restricting the availability of the monetary option. The restrictions are both formal and ideological. Some lawyers are not allowed to exercise the monetary option, and buying one's way out, even where permitted, is only tolerated.

All these complexities are avoided by providing an individualized time-or-money option designed to make the choice for each lawyer as equal and uncoerced as possible. Thus, I believe, the free choice of time-or-money that is the heart of this proposal best furthers the goals of and meets the objections to mandatory pro bono.

#### B. *Advantages of a Modest, Poverty-Focused Proposal*

The proposal advocated here also differs from many by restricting eligible mandatory pro bono work to legal services to the poor, while simultaneously

---

<sup>40</sup> Under a flat-rate system, the costs are, in effect, regressive. To the extent lawyers bear the costs, the highly compensated can buy their way out for a smaller percentage of their income than the modestly compensated. If the costs are passed through to clients the regressiveness is still likely, since the more highly compensated attorneys tend to represent the wealthier clients. Cf. MARKS, *supra* note 8, at 275-82 (noting that any mandatory pro bono system imposes the costs of representation on lawyers and/or paying clients, depending on the competitiveness of the market for legal services).

Some have drawn analogies to "the notorious Civil War draft avoidance device." Joseph W. Bellacosa, *Obligatory Pro Bono Publico Legal Services: Mandatory or Voluntary? Distinction Without a Difference?*, 19 HOFSTRA L. REV. 745, 749 (1991). Clearly, a military draft with a buy-out is both inequitable and a predictable impetus to class violence. See JAMES M. McPHERSON, *BATTLE CRY OF FREEDOM: THE CIVIL WAR ERA* 600-11 (1988) (describing draft riots fueled by a rule allowing a draftee to avoid serving through a three hundred dollar commutation fee). The analogy is inapt, however. First, the obligation avoided here is a contribution of time; pro bono lawyering involves no discernible risk to life and limb. Second, the proposal here does not favor the rich; all attorneys earning an income derived in part from that status are equally able to choose a monetary option and equally burdened.

The most highly compensated attorneys may be more likely to choose even the "progressive" monetary option insofar as they face higher opportunity costs for the non-billable time spent learning a new area of law than do less specialized, younger lawyers. These are, however, genuine cost differences that the structure of the pro bono obligation ought not to ignore.

imposing only a quite modest obligation of 20 hours per year. This aspect of the proposal similarly is designed to meet or reduce the force of certain objections to any mandatory pro bono scheme.

These objections, often put forth by those who are themselves seriously committed to pro bono work, are that mandatory pro bono may negatively affect existing, voluntary pro bono. First, it might reduce the psychic value to the lawyer from having volunteered her services. Second, it might reduce the supply of pro bono legal services to causes and individuals not within the scope of the mandatory program. Doubtless, such costs would be incurred. Some lawyers currently donate more time to pro bono causes than would be obligatory and derive therefrom a sense of moral satisfaction and professional pride that is full psychic satisfaction for the lost income. Insofar as some resent and resist the mandatory obligation, they may refuse to do more than the bare minimum and be less pleased with that which they do. Furthermore, some of what is currently credited as pro bono work would not qualify under the proposed mandatory pro bono scheme; the incentives for doing such work would be reduced. Since no mandatory pro bono program can wholly avoid such costs, the issue must be the extent to which under any given proposal the benefits of the program outweigh the costs.

In considering the costs of "diverting" lawyers from other pro bono work, we must distinguish between genuine pro bono work directed toward causes other than the legal needs of the poor and activities claimed as pro bono, but arguably "misabeled." Legal work done without charge for one's relatives or friends may be a normal and appropriate part of a lawyer's workload, but it is not particularly deserving of the moral approbation that is the current "payment" for pro bono work nor legitimately a basis for the bar's institutional claim of commitment to public interest. Similarly, unpaid legal work, i.e., for the local symphony or community chest is more appropriately accounted as "business development."<sup>41</sup> Little weight need be given to concerns of infringement on time spent on such activities.

The imposition of a time or money commitment limited to legal work for the poor might also divert lawyers from time spent, especially if claimed as pro bono, providing non-legal work to the needy. Such activities are surely a social good, and one should applaud lawyers who spend time staffing soup kitchens or tutoring learning-disabled children. Nonetheless, lawyers have a special skill and a comparative advantage that suggests a legitimate professional obligation to apply these skills on behalf of the needy, or at least to ensure, through a monetary contribution, that they are provided. Lawyers can, of course, continue to engage in such praiseworthy activities as these, and they can similarly continue to provide legal advice to the symphony and to Uncle Charlie. The proposal only requires that these cannot substitute for the modest 20-hour (or its equivalent) obligation to provide legal services to the poor.

---

<sup>41</sup> See generally LUBAN, *supra* note 8, at 278-79 (describing the content of much work currently self-credited as pro bono).



Potentially more troubling is the effect of a mandatory pro bono proposal, such as this one, on traditional pro bono legal work that would fall outside its boundaries, such as most of the environmental, international human rights and reproductive rights litigation that has been a staple of large firm pro bono practice.<sup>42</sup> Since the supply of legal services for such efforts is not wholly inelastic, it would be reduced by the imposition of a mandatory pro bono time commitment for other causes.<sup>43</sup> This cost could, of course, be eliminated by expanding the scope of the program to accommodate a more inclusive definition of pro bono. This would necessarily reduce the legal services otherwise provided to the poor, however, and thus conflicts with the presumption that the primary goal of mandatory pro bono is meeting the legal needs of the poor.<sup>44</sup>

The structure of this proposal was conceived so as to maximize the provision

---

<sup>42</sup> Certain high-profile cases are relatively resistant to the pressures of alternative time obligations because they provide substantial professional prestige value for the lawyers undertaking them. This proposal is thus unlikely to reduce below the optimal level the extent of pro bono lawyering devoted to such cases. See, e.g., Matt Siegel, *A Presidential Pro Bono Case*, AM. LAW., Jan.-Feb. 1993, 24 (describing Covington & Burling's decision to provide counsel pro bono to president-elect Clinton in a case "challenging his qualifications to be commander-in-chief").

<sup>43</sup> Advocacy groups for such causes are thus correctly concerned about mandatory pro bono proposals. See, e.g., John C. Scully, *Mandatory Pro Bono: An Attack on the Constitution*, 19 HOFSTRA L. REV. 1229, 1231 n.10 & 1253 n.139 (1991) (describing opposition to plan by "Legal Action for Animals").

Roger C. Cramton makes a somewhat distinct criticism. He argues that increased legal services for the poor may reduce the availability of legal services for the near-poor by reducing the willingness to perform such services pro bono or for reduced fees. Cramton, *supra* note 17, at 1129. In theory, the near-poor, like other paying clients, would also be harmed by the general price-increasing effect of increasing lawyers' costs. Such an effect logically follows from any income-indexed program to help the poor, however, and has not generally been accepted as a justification for providing social programs to everyone or no one. Furthermore, such an argument would be weaker for legal services than for programs providing housing or medical care for the poor. The poor are disproportionately dependent on government programs, rather than market transactions, for these other goods. Thus, they are likely to have a greater need for legal services (in order to correct the inevitable bureaucratic glitches in such programs) than are the near-poor. See also Maher, *supra* note 9, at 977 (citing study indicating that the poor have, on average, a greater need for legal services than the middle class).

<sup>44</sup> Accord Cramton, *supra* note 17, at 1129 (arguing that mandatory pro bono will only have a significant impact on the extent of legal services for the poor if the definition of eligible services is narrow). See also SCLPSR REPORT, *supra* note 5, at 8 (stating the following in support of proposal requiring the "substantial majority" of time to be devoted to legal services for the poor: "[W]hile the Committee recognizes the value and importance of other types of pro bono activity, it strongly believes that due to the enormity of the urgent need for legal services that exists among the disadvantaged, the provision of legal services to that group must be given priority over all other types of pro bono service.").

of legal assistance to the poor, while minimizing the deleterious effect on other forms of pro bono and the lawyer's psychic income derived from a sense of volunteerism. The proposal requires 20 hours per year or the monetary equivalent, on the low end of existing concrete proposals.<sup>45</sup> This is a best guess for the optimum level; it would be subject to revision in light of future studies of the elasticity of supply for pro bono services or changing normative consensus regarding the relative value of more legal services for the poor versus less psychic satisfaction for lawyers and fewer legal services for other deserving groups.

Because the level is set low, it is relatively easier for those who wish to volunteer, and especially for those who wish to volunteer for causes not included in the mandatory program, to do so with additional time. The benefit/cost ratio is enhanced if one examines the (admittedly impressionistic and anecdotal) evidence of the existing patterns of pro bono activities. Those patterns suggest that provision of pro bono work is not arrayed along a normal curve. Rather, a significant portion of the legal community — what may be called the volunteers — currently provides, in voluntary pro bono work, closer to 40 hours per year or more.<sup>46</sup> Meanwhile, another large group does little or nothing.<sup>47</sup> By setting the mandatory level between these two peaks, we can significantly increase available legal services from the group which has been undercontributing, while limiting the negative consequences on the work currently being done by the volunteers. Those volunteers can continue to obtain the moral satisfaction of volunteering their additional services without being

---

<sup>45</sup> See, e.g., LUBAN, *supra* note 8, at 277 (proposing 40 hours per year); MODEL RULES OF PROFESSIONAL CONDUCT Rule 6.1 (1993) (50 hours per year, a "substantial majority" of which are to be services to the poor). The 20 hours per year level has been proposed in New York and Florida. See *Marrero Report*, *supra* note 9, at 768 (40 hours bi-annually); *Florida Bar Rules II*, 598 So.2d 41 (20 hours annually).

While the particular obligation can be debated, there must be some concrete hour/dollar obligation toward the legal needs of the poor. A vague tilt toward legal services to the poor, such as the new Model Rule 6.1, is both unadministrable and unlikely to have the necessary impact. See MODEL RULES OF PROFESSIONAL CONDUCT Rule 6.1, *supra* note 10.

<sup>46</sup> See Marc Galanter & Thomas Palay, *Let Firms Buy and Sell Credit for Pro Bono*, NAT'L L.J., Sept. 6, 1993, at 17 (claiming that "hundreds of law firms signed on to an ABA challenge to donate 3 percent to 5 percent of their annual billable hours to free services for the poor").

<sup>47</sup> See, e.g., Watkins, *supra* note 2, at 180 n.19 (survey of 6,000 New York attorneys showed that more than 43% had done no voluntary pro bono work the previous year, while 24% neither did any nor had any intentions of doing any, unless compelled). National survey data is similar. See, e.g., Lardent, *supra* note 5, at 90 & n.45, indicates that only 16.9% of the nation's lawyers took part in organized voluntary pro bono programs. Another survey showed that 36.6% of lawyers spent fewer than 10 hours per year on pro bono, while 9.9% contributed more than 100 hours. *Lawyers' Perspective*, A.B.A. J., May 1990, at 36.

overburdened.<sup>48</sup> The non-poor recipients of such voluntary pro bono would continue to receive at least the excess over 20 hours per volunteer. Moreover, the political opposition may be reduced: the impact on the volunteers is marginal, while the noncontributors are forced to complain of an obligation significantly less than the average current contributions of their volunteer compatriots.

*In toto*, I suggest that a mandatory pro bono proposal which (1) allows a time or money option keyed to the lawyer's own compensation rate and (2) extends to legal services for the poor, is best-suited to fulfilling the objectives and minimizing the force of the objections to any mandatory pro bono system. The remaining question is whether the proposed structure is so unwieldy or administratively burdensome that it would be unworkable. In order to meet that concern, the remaining section of this essay reviews the proposal in somewhat greater detail, focusing particularly on administration.

### III. THE PROPOSAL: ADMINISTRATION AND IMPLEMENTATION

This section of the essay provides a preliminary sketch of the mandatory pro bono proposal with enough detail to allow the reader to compare it with other options and to obtain some sense of its practicality.<sup>49</sup> In essence, each year every lawyer in the jurisdiction would be required to contribute towards the legal needs of low-income persons either: 1) 20 hours of his or her own time doing such work, or 2) a dollar amount equal to what that lawyer would earn doing 20 hours of legal work for paying clients. The obligation would be imposed on every attorney licensed to practice in the jurisdiction except retired attorneys or judges. Eligible work would involve direct services to clients whose income falls below the defined level, e.g., 120% of federal poverty standards, or to organizations whose clientele is entirely or primarily poor, such as those serving battered women, the homeless or prisoners. The attorney (alone or collectively, as indicated below) would provide 20 hours annually of such legal services as counseling, transactional work, or litigation. Eligible work would also comprise such services as screening clients for eligible organizations and training other attorneys in relevant areas such as social security law. Much of this work could be readily completed in segments of 20 hours or less, especially if done through an advocacy organization or after a screening which had defined and delimited the legal problem to be dealt with. Larger time commitments could be managed by permitting carryforwards of excess hours for, say, three years.

Because of the buy-out option, the system is concededly more complex to administer and enforce than a time only system or a flat-rate monetary option

---

<sup>48</sup> Cf. *Florida Bar Rules II*, 598 So.2d at 59 (Kogan, J., dissenting) (proposing 20 hours per year of mandatory legal services for the poor plus an additional 30 hours per year of all forms of pro bono as an aspirational goal).

<sup>49</sup> The best early discussions of the issues involved in designing a mandatory pro bono proposal are Lardent, *supra* note 5, and LUBAN, *supra* note 8, at 279-82.

system. The remainder of this article responds to such concerns by outlining a system for such administration. It posits that a reasonably accurate individualized time-to-money conversion system is practicable and that the moderate increases in administrative and enforcement difficulties are more than outweighed by the increased legal services for the poor and greater fairness and efficiency.<sup>60</sup>

The system for determining a lawyer's "buy-out price" depends on how the lawyer is compensated. The vast majority of lawyers work under one of three systems. Some sell their time to clients (or have it sold by their firms) at an hourly rate. Some are employees, whose employer is the "client" for their legal work. Most complex for this proposal, some work for clients on a contingency arrangement.

Determining the monetary obligation option for the first two forms of compensation is relatively straightforward. Those who sell their time at an hourly rate can have that rate translated directly into their pro bono obligation. If one's basic client rate is \$100 per hour, the corresponding monetary option is \$2,000; at \$200 per hour, it is \$4,000. Those who are salaried can be assessed according to that salary. For simplicity's sake, assume an average annual workload of 2,000 hours.<sup>61</sup>

The accounting is most complex for those who charge their clients on a contingency fee basis, such as most personal injury lawyers. The most practical means of assessing the time-value of such an attorney's legal work would be by an analog of the "annual salary divided by average hours worked" used for salaried lawyers. The base number would be the attorney's annual income, perhaps averaged over the last three years to reflect the unevenness of income in many such practices, divided, again, by a presumed average annual workload of 2,000 hours.

The proposal in effect differentiates between salaried attorneys and those

---

<sup>60</sup> Some commentators have suggested that problems of administration and enforcement militate against mandatory pro bono. See, e.g., Bretz, *supra* note 9. The question of the net benefit of a mandatory system, with its increased costs of administration, over a voluntary system is ultimately an empirical one. I do not attempt here to develop the necessary data or create the model that would be necessary to answer that question. When one considers the numbers of attorneys who currently avoid pro bono, but are likely to provide pro bono if mandated, the benefits seem likely to exceed the costs of administration, particularly if the enforcement system suggested here were adopted.

<sup>61</sup> This should be treated as a rule, to avoid quibbling over unusually hectic or relaxed years. If someone only worked the equivalent of half-time, because of a job change during the year or because the job was designed to be part-time, the unadjusted formula would underrepresent the dollar value of their time and thus create an incentive to exercise the monetary option. (The 2,000 hours is measured against the income earned from law-related work.) This seems generally sensible: these cases are likely to include people who are not fully exploiting the value of their license to practice law. Given that the license provides the underlying justification for the "time-or-money" tax, this provides a means of limiting the effect of the tax on those who are devoting most of their time to activities unrelated to their law licenses.

who earn their living directly from clients. The base numbers for the latter, whether as hourly rate or as gross income, include the overhead costs associated with the work and are thus relatively larger. However, as owners of the business, they would be responsible for the overhead associated with time spent doing pro bono work and thus should also be assessed for them under the monetary contribution option.<sup>52</sup> If salaried attorneys choose to contribute hours, they are likely to have relatively little overhead, by doing the work in their spare time or in the interstices of their regular work.<sup>53</sup> If the work undertaken involved an outlay of funds beyond some de minimis amount (say, \$100), that expenditure could be credited to the attorney as a monetary contribution in addition to the time spent on the project.

Any mandatory pro bono proposal must resolve the issue of whether the obligation must be met by each attorney individually or whether it can be carried out by collectivities, such as preexisting firms or groups formed for that purpose. There is no apparent reason not to permit a law firm to pool its obligation, arranging to have one or a small group of its attorneys do the legal work required of all. Since the proposal allows attorneys to opt not to do poverty law work themselves via the monetary option, it ought to be equally possible to contribute time indirectly.

Because the monetary equivalent to the 20-hour per year obligation is determined based on an attorney's own hourly rate, the combined obligation cannot be calculated simply by adding up the 20 hours for each of the attorneys in the group. Rather, if obligations are pooled, they should be measured in dollars and then translated back into a time obligation. That time obligation, in turn, should be measured by the time value of the attorney doing the pro bono work on behalf of the firm.<sup>54</sup>

Imagine, for example, a firm with one lawyer charging \$300 per hour, two

---

<sup>52</sup> Law firm associates should be permitted to use their salaries as the base number, then, unless the law firm as an entity makes the time/money choice. In that scenario, it should value its associates' time at the cost to the firm, *i.e.*, their hourly rate.

<sup>53</sup> See *supra* text accompanying note 24. More readily designated resources, such as copying and long-distance calls, could be used insofar as they did not interfere with the ordinary business of the office and were reimbursed, while flex-time would permit the attorney to do pro bono work during what would otherwise be paid time, with appropriate notice and readjustment. See generally Lerman, *supra* note 23 (advocating narrowing the restrictions on use of government's time and resources for pro bono activities by its employees). Corporations can similarly facilitate pro bono work by their staff with a modicum of imagination and flexibility and at little cost to themselves.

<sup>54</sup> By linking the obligation to the specific value of different attorneys' time, this proposal eliminates the perceived unfairness of permitting partners in large law firms to pass off their obligations to young associates, while solo practitioners must do the pro bono work themselves. This concern led the Florida Supreme Court to forbid such pooling across law firms except where the firm has taken on a large scale pro bono case, such as impact litigation or death penalty work. *Florida Bar Rules II*, 598 So.2d at 44. By permitting pooling in all cases, this proposal avoids the difficult issue of what cases are large enough to fit within this "exception."

lawyers at \$200 per hour, and 6 lawyers at \$75 per hour. If they were all to choose the monetary alternative, the total firm contribution would be \$23,000  $((300 + 400 + 450) \times (20))$ . If, instead, they were to designate one of the firm's lawyers to meet the collective pro bono obligation with services, it would not be sufficient that one of the \$75 per hour associates give 180 hours  $(9 \times 20)$ , since that would erroneously value each of the member of the group at the hourly rate of the attorney doing the work. This would distort the firm's incentives, since the cost would be \$13,500  $(180 \times 75)$ . The goal should be, as with individuals, to equalize costs and thereby ensure neutrality between time and money. If the firm were to meet its obligation through the work of a \$75 per hour attorney, then, it should provide \$23,000 of his services, *i.e.*, approximately 307 hours of his time  $(23,000 \div 75)$ .

So long as the attorney doing the work for the group is paid more than a legal services lawyer, a firm exercising this option would provide fewer total hours of legal work for the poor than if they had each given money. The same effect results when an individual attorney, paid more than legal services rates, chooses to contribute time.<sup>65</sup> Partners may wish to provide pro bono work "in house" because they believe it is a selling point to potential associates or provides low cost experience in litigation and client contact to their young lawyers.<sup>66</sup> The proposal allows firms to make these choices.

It is more dubious whether groups should be permitted to form solely for the purpose of pooling mandatory pro bono obligations.<sup>67</sup> One likely benefit is to permit an attorney not associated with a large firm to take on a substantial pro bono project by, in effect, selling his additional pro bono time to other attorneys. However, such a desire can frequently be accommodated by provisions for a carry-forward of excess pro bono hours. Ad hoc pooling might also

---

<sup>65</sup> Such a system would not expose all lawyers within a firm to the legal problems of the poor. Nonetheless, the existence of such work "in-house" may have some educative effect.

<sup>66</sup> Many large firms commit significant resources to such pro bono, through a variety of structures. Every six months, Covington & Burling funds three associates to work for legal services. Telephone Conversation with Jan Flack, Coordinator of Public Service Activities, Covington & Burling (June 21, 1993). Hunton & Williams opened a pro bono satellite office providing legal services to the poor and working class of Richmond. Telephone Conversation with Kay Stokes, Administrative Assistant, Hunton & Williams (June 10, 1993). *See also* Bellacosa, *supra* note 40, at 749 (noting the "exciting, revolutionary and commendable" program at Hunton & Williams). Greenberg, Traurig has done indigent representation, zoning work for a church in a poor black area and death row representation. *See* NATIONAL ASS'N FOR PUBLIC INTEREST LAW, LAW FIRMS AND PRO BONO 40-41 (1993).

Professor Macey suggests that these positive externalities of pro bono work for large firms unfairly advantage them relative to solo and small firm practitioners. Macey, *supra* note 6, at 1119-21. This may be so, but it is a fact about law practice and not about pro bono.

<sup>67</sup> Such pooling is forbidden under the ABA proposal. *See* SCLPSR REPORT, *supra* note 5, at 9. *But see* Marrero Report, *supra* note 9, at 755.

reduce the financial support for full-time legal services work. One might argue, however, that a market in pro bono services would be a more efficient means of increasing the quantity and quality of such work than would providing increased funding for pro bono legal work under the auspices of groups chosen by the administering agency, such as legal services.<sup>58</sup>

The administering agency needs to monitor compliance with the program. For attorneys who opt to provide money in lieu of service, the administering agency must determine the amount each attorney owes and whether payment was made in the proper amount. For those attorneys who choose to provide legal services themselves, the agency must verify whether the work was done, whether it was done on behalf of an eligible organization or individual, and whether its quality was adequate.

To ensure compliance, the agency would require attorneys to satisfy an annual reporting requirement. First, attorneys would have to submit a form indicating which option they selected. Issues of reporting and auditing differ depending on whether attorneys give money or time. For attorneys exercising the monetary option, reporting is fairly simple but an auditing and control system must be devised. The reporting form should require the attorney exercising the monetary option to indicate the client for whom she has worked, the amount due and include documentation and/or an affidavit that verifies the basis for the amount.<sup>59</sup>

The information which this administrative agency collects must be subject to confidentiality controls. It is not necessary, however, for the agency independently to verify financial information for each attorney. Rather, the system can be modeled on one already in place in which individuals provide information on their finances and are assessed in accordance with that information: the Internal Revenue Service. As with the IRS, the general procedure could be one of self-assessment and reporting. Most reports would simply be filed and entered into the records. The agency would seek verification in those cases in which the materials provided appeared unusual according to appropriately developed criteria<sup>60</sup> and a small, random sampling of other filings. Because the cost of compliance, 20 hours of work or its monetary equivalent, is relatively low, and because non-compliance could result in severe penalties, including

---

<sup>58</sup> See Galanter & Palay, *supra* note 46, at 17. The two options essentially apply abstract principles about the desirability of replacing or supplementing public services with a private market to the market for pro bono legal services. Cf. Symposium, *Perspectives on Privatization and the Public Interest*, 6 YALE L. & POL'Y REV. 1 (1988) (discussing legal and policy implications of shifting various government services into the private sector). One concern with the Galanter & Palay proposal is the increased risk of abuse and the difficulties of monitoring such a dispersed market for pro bono legal services.

<sup>59</sup> If a firm or group pools its obligations, the forms should be submitted collectively to facilitate review.

<sup>60</sup> For example, attorneys at the same address and with the same number of years in practice might be expected to show incomes within the same general range.

disbarment, lawyers would probably comply notwithstanding the modest risk of apprehension. This being so, enforcement of this proposal should not require expensive administrative oversight. Nevertheless, some audit system is necessary: some will view cheating bureaucracies as a positive challenge and there may be resentment, particularly at the beginning, by those deeply opposed to the underlying policy of mandatory pro bono.

For attorneys (or collectivities) contributing time, the reporting is somewhat more complex, but auditing is simpler. The procedure must allow for both services rendered to an eligible client organization and services rendered to eligible individuals.<sup>61</sup> In the former situation, the attorney can simply submit a form stating the time contributed and the client organization on whose behalf the time was spent.<sup>62</sup> Where services are rendered to individuals, there must be a means of ensuring that the individuals are eligible. The best way of administering such services is to provide them under the auspices of an institution designed to link attorneys with potential individual low-income clients.<sup>63</sup> Many bar associations and local legal services organizations already have such procedures in place, and more such entities would likely arise as the demand for their services increased.<sup>64</sup> These agencies, in addition to ensuring that the client is eligible, could also provide some protection against padding of hours. The administering agency could also audit time claims occasionally as a back-up protection against fraud.<sup>65</sup>

This proposal is still preliminary. Its precise form would presumably reflect the particularities of a jurisdiction, the structure of the agency (government agency or integrated bar) that would administer it, and the particular history of the local legal system in regard to pro bono activities. If local advocates of some form of mandatory pro bono are convinced that the proposal outlined

---

<sup>61</sup> If a firm or group pools its obligations, the forms should be submitted together to facilitate review of the total time obligation of the group matched against the total time contribution on behalf of the group.

<sup>62</sup> Again, the organization to which or under whose auspices the time was contributed could provide documentation to the attorney or directly to the supervising agency.

<sup>63</sup> While attorneys may discover genuinely eligible clients independently, the difficulty of distinguishing between such cases and those that are akin to personal favors or work pro bono only in retrospect is too high. The administratively cleanest solution is to exclude from eligibility such non-institutionally screened work. Alternatively, one might formally permit such work to qualify, subject to later determination that it was ineligible while designating agency-administered work as a safe harbor. *See Marrero Report, supra* note 9, at 792.

<sup>64</sup> In addition to providing a "screen" to ensure that the clients are eligible, such intermediary institutions could help match attorney specialists and low-income clients with particular needs, such as immigration or tax problems.

<sup>65</sup> It might be reasonable to require attorneys who meet their obligation by direct, unsupervised client service to indicate the general nature of the work done as well as the hours spent. A form claiming, for example, 18 hours for an uncontested divorce with no children might trigger review according to pre-existing audit criteria similar to those proposed for occasional review of requisite monetary contributions.



here better furthers the underlying objectives, the work of refinement and political advocacy can and should be done. Those of us dedicated to enhancing the availability of legal services for the poor must decide which proposal best advances that goal and then fight to see that it is implemented. We must not settle for hortatory, voluntary pro bono. We can, must, and will do better.